

Hallahan v Singh

2019 NY Slip Op 31888(U)

May 15, 2019

Supreme Court, Queens County

Docket Number: 706379/15

Judge: Robert I. Caloras

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ROBERT I. CALORAS

PART 36

Justice

-----X
SUSANA HALLAHAN and GERARD HALLAHAN,

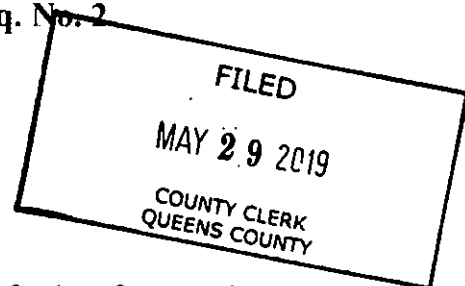
Index No.706379/15
Motion Date: 3/28/19
Motion Cal. No. 11
Seq. No. 2

Plaintiffs,

-against-

MAHENDRA SINGH,

Defendant
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The following papers numbered E23-E36 read on this motion by the defendant for an order pursuant to CPLR 3212 granting summary judgment on the grounds that as a matter of law the plaintiff's injuries (1) do not constitute serious injuries as defined by 5102(d) of the New York Insurance Law and/or (2) were not causally related to the subject accident.

	PAPERS
	<u>NUMBERED</u>
Notice of Motion-Affirmation-Exhibits.....	E23-E31
Affirmation in Opposition-Exhibits.....	E32-E36

Upon the foregoing papers, it is ordered that defendant's motion is determined as follows:

This action arises out of a motor vehicle accident which occurred on August 1, 2013 at approximately 11:45AM, at or about on 35th Avenue and 150th Street, Queens, New York. At the time of the accident, the plaintiff, Susana Hallahan ("plaintiff"), a pedestrian, was allegedly struck by the vehicle operated by the defendant, and alleges to have sustained serious injuries as a result of the subject accident.

Defendant now moves for an order granting summary judgment in his favor and dismissing the complaint on the ground that plaintiff has not sustained a serious injury within the meaning of Section 5102 of the Insurance Law. In considering this motion, the Court must first determine whether plaintiff has established a *prima facie* case of sustaining a serious injury within the meaning of Insurance Law 5102 (d) (see, Licari v Elliot, 57 NY2d 230 [1982]; Armstrong v Wolfe, 133 AD2d 957,958 [3rd Dept. 1987]). To grant summary judgment it must clearly appear that no triable issue of fact is presented (Miceli v Purex Corp., 84 AD2d 562 [2d Dept. 1981]). The Court need not resolve issues of fact or determine matters of credibility, but

must determine whether such issues exist (Bronson v March, 127 AD2d 810 [2d Dept. 1987]).

Defendant has submitted *inter alia* the following: an attorney affirmation; the Summons and Complaint; the Verified Bill of Particulars and Verified Supplemental Bill of particulars; plaintiff's deposition transcript; plaintiff's medical record from Dr. Ana Romero; plaintiff's medical records from Koam Physical Therapy, P.C.; affirmed medical report from Joseph Y. Margulies, MD, PhD; and affirmed medical report from Dr. Chandra M. Sharma.

At defendant's request, on January 19, 2018, Dr. Margulies, a board certified orthopedic surgeon, examined the plaintiff in relation to injuries allegedly sustained as a result of the accident. After performing numerous objective medical tests, including a goniometer, and measuring plaintiff's cervical spine, lumbar spine and left elbow range of motion, Dr. Margulies found that plaintiff had full range of motion in all areas, no tenderness upon palpation, no orthopedic deficits and had no disability whatsoever. Based upon his review of the plaintiff's medical records and his own physical examination, Dr. Margulies concluded, in his expert medical opinion, that plaintiff had no orthopedic deficits or disability.

At defendant's request, Dr. Sharma, a board certified neurologist, examined plaintiff on November 19, 2018. Dr. Sharma obtained a history of plaintiff, and performed numerous objective medical tests and measured plaintiff's range of motion. Dr. Sharma used a goniometer to measure plaintiff's range of motion in her cervical and lumbar spine. These tests revealed normal range of motion in these body parts. Dr. Sharma found that any alleged injuries plaintiff sustained as a result of the accident had resolved and there were no objective neurological signs of any injuries.

At plaintiff's deposition, she testified that after the accident she refused medical attention and did not go to the emergency room. Plaintiff testified that she sought treatment a few days after the subject accident, and that the last time she sought treatment was two or three years ago. Plaintiff also testified that she has no planned medical appointments for her injuries that she allegedly sustained from this accident. Plaintiff testified that she only took off possibly two days from work, including the day of the subject accident. Since the time of the accident, plaintiff testified that she gone on vacation multiple times.

Defendant argues that the medical reports of orthopedist, Dr. Margulies, and neurologist, Dr. Sharma, provide this Court with objective medical evidence showing that plaintiff has full range of motion, no permanent injury, and no significant limitation to the cervical spine, lumbar spine and left elbow. Defendant further argues that the objective medical evidence, combined with plaintiff's admissions in her deposition, demonstrates that plaintiff did not sustain a serious injury according to the 90/180 day prong of the No-Fault Law. In addition, the plaintiff treated intermittently from August 5, 2013 until March 27, 2014 and then again from October 1, 2015 until October 29, 2015. Since then, plaintiff ceased treatment for the subject accident. Therefore,

defendant argues that the plaintiff has an unexplained gap in treatment.

The Court finds that the defendant has submitted competent proof in admissible form which establishes that plaintiff has not suffered a serious injury within the meaning of Insurance Law § 5102 as a result of the subject accident (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]; Carballo v Pacheco, 85 AD3d 703 [2d Dept. 2011]; Ranford v Tim's Tree & Lawn Serv., Inc., 71 AD3d 973 [2d Dept. 2010]). Consequently, the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law (see, Gaddy v Eyler, supra; Sin v Singh, 74 AD3d 1320 [2d Dept. 2010]). The plaintiff must present objective evidence of the injury. The mere parroting of language tailored to meet statutory requirements is insufficient (see, Mamun Khan v Shoaib Hamid, 19 AD3d 460 [2d Dept. 2005].) Further, courts have consistently held that a plaintiff's subjective claim of pain and limitation of motion must be sustained by verified objective medical findings (see, Grossman v Wright, 268 AD2d 79 [2d Dept 2000]). Moreover, these verified objective medical findings must be based on a recent examination of the plaintiff (*Id.*). In that vein, any significant lapse of time between the cessation of the plaintiff's medical treatments after the accident and the physical examination conducted by his own expert must be adequately explained (*Id.*). Therefore, in order to successfully oppose a motion for summary judgment on the issue of whether an injury is serious within the meaning of Insurance Law § 5102(d), the plaintiff's expert must submit quantitative objective findings in addition to an opinion as to the significance of the injury (*Id.*).

In opposition, the plaintiff argues that she has raised triable issues of fact in her opposition with respect to permanent consequential limitation of use of a body organ or member, significant limitation of use of a body function or system, and 90/180 category under the statute. The plaintiff has submitted the following: an attorney affirmation; affirmed report from Dr. Sunil Butani; certified medical records from Dr. Neofitos Stefanides; and medical records from Michael Trimba, board certified in PM&R and pain medicine.

At her deposition, plaintiff testified that she is currently employed by RadNet, also known as Lenox Hill Radiology. At the time of the accident, plaintiff was a pedestrian, in a stationary position. Plaintiff testified that the accident took place prior to the intersection of 35th Ave. and 150th Street, Queens, New York, approximately two car lengths from the corner. While plaintiff was waiting to enter her vehicle, she testified that the defendant's side view mirror came into contact with the right side of plaintiff's back and continued along her back to her left elbow. Immediately after the accident occurred, plaintiff testified that she was experiencing pain to her lower back, and that her elbow was throbbing. Plaintiff testified that a few days after the accident, her pain increased, at which point she sought medical

attention from Dr. Anna Romero, an internal medicine doctor. After visiting Dr. Romero, plaintiff visited Dr. Stefanides, an orthopedic surgeon. Dr. Stefanides referred plaintiff to undergo physical therapy treatment at Koam Physical Therapy. Plaintiff testified that she received physical therapy treatment for over three months following the accident, primarily to her lower back and her left elbow. Plaintiff testified that she also underwent MRI examinations to her lower back and her left elbow. Plaintiff testified that she has received treatment to her left elbow from Dr. Hecht, a pain management physician. Prior to the accident, plaintiff testified that she was an extremely active person engaged in sport activities on a regular basis, was a basketball and softball coach for her children's teams, and would regularly go ice-skating with her children. As a result of the accident, plaintiff no longer performs these activities, and is unable to perform her daily activities, for fear of aggravating her back and elbow pain. Plaintiff also testified that she still experiences pain to her lower back, which is constant in nature.

On January 30, 2019, Dr. Sunil Butani, examined the plaintiff. Since the accident, plaintiff has experienced lower back pain and pain across the left elbow. Currently, plaintiff complains of lower back pain, and still experiences tingling and numbness in her right lower extremity. Dr. Butani's physical examination of the plaintiff revealed tenderness and spasms across her lumbosacral spine, including flexion of plaintiff's lumbosacral spine restricted at 60° (normal flexion being 90°), for a deficit of 30°. Dr. Butani further determined that SLR on the right was 30°, and on the left was 60°. Based upon his examination of the plaintiff, Dr. Butani opined that she continues to have lower back pain syndrome with a 33% restriction of flexion of the lumbosacral spine. Dr. Butani also reviewed plaintiff's MRI films, which revealed disc herniation at L5-S1, L4-L5 and L3-L4 on the left side. Dr. Butani determined that plaintiff's prognosis is guarded, and that she continues to have pain across the lower back with numbness and parasthesias in the lower extremity almost 5 years post-accident. Dr. Butani opined that plaintiff would benefit from epidural steroid injections, and may also need surgery, since her MRI reveals multiple herniated discs in the lumbar spine. Dr. Butani further opined that plaintiff's continuous low back pain with parasthesias of the leg is caused by the motor vehicle accident of August 1, 2013 and that she has sustained a permanent partial disability, with regards to her lower back.

Dr. Stefanides treated the plaintiff from August 14, 2013 to April 25, 2014. In the August 14, 2013, September 18, 2013, and November 13, 2013 medical records, Dr. Stefanides states that the plaintiff's injuries were causally related to the accident, and that they have affected her mobility and quality of life.

Plaintiff also asserts that defendant's claims that there was a gap in her medical

treatment was sufficiently addressed in her deposition transcript. At her deposition, plaintiff testified that although she did not have any future appointments specifically scheduled, she was consistently visiting a chiropractor since the occurrence of this accident, because she is always experiencing pain to her back. Plaintiff testified that as a result of this accident she opened a Worker's Compensation claim. Plaintiff testified that her Worker's Compensation benefits presented significant barriers to her receiving any further treatment. Specifically, plaintiff testified that when she visited a chiropractor on numerous occasions during the alleged "gap in treatment", she was utilizing her own private insurance, because it was easier then seeking payment for treatment through her Worker's Compensation carrier. Therefore, plaintiff argues that the defendant has failed to present any evidence that a gap in treatment existed, because she has continuously been seeing a chiropractor for treatment to her lower back as a direct result of this accident.

Plaintiff argues that the evidence she has submitted demonstrates a triable issue of fact as to whether the injuries she sustained as a result of the accident constitute a permanent consequential limitation of use of a body organ or member, significant limitation of use of a body function or system, and 90/180 category under the statute.


The Court finds that the affirmed report of Dr. Butani, which was based upon an examination of the plaintiff five years after the accident and did not explain the lengthy gap in treatment, is insufficient to raise a triable issue of fact as to whether plaintiff sustained a serious injury (see, Ali v Vasquez, 19 AD3d 520 [2d Dept. 2005]). Moreover, plaintiff's claim that she has continuously been seeing a chiropractor for treatment to her lower back as a result of this accident, does not establish that there was no gap in treatment. Plaintiff's self serving statements, without any medical evidence demonstrating that she was treated by a chiropractor during the relevant period, is insufficient to defeat defendant's claim that there was a gap in treatment (see, Pou v E & S Wholesale Meats, Inc., 68 AD3d 446 [1st Dept. 2009]). Therefore, the branch of defendant's motion seeking to dismiss plaintiff's claims under the permanent consequential limitation of use of a body organ or member and significant limitation of use of a body function or system categories of Insurance Law 5102(d) is granted.

However, the Court finds that the plaintiff has established an issue of fact with respect to the 90/180 category. Plaintiff claims that all of the documents she submitted in opposition to the motion are admissible, because both Dr. Margulies and Dr. Sharma reviewed and relied upon these records in reaching their expert opinions in their respective "IME" reports. It is well settled that plaintiff's medical evidence submitted in opposition to a motion for summary judgment must be presented by way of sworn affirmations or affidavits (Bonsu v

Metropolitan Suburban Bus Auth., 202 AD2d 538 [2d Dept. 1994]; Pagano v Kingsbury, 182 AD2d 268 [2d Dept. 1992]). However, a reference to unsworn or unaffirmed medical reports in a defendant's motion is sufficient to permit plaintiff to rely upon those same reports (see Kearse v NYC Tr. Auth., 16 AD 3d 45 [2d Dept. 2005]; Ayzen v Melendez, 299 AD2d 381 [2d Dept. 2002]). The Court finds that since defendant's examining physicians reviewed and relied upon the unaffirmed documents plaintiff submitted in opposition to the motion, plaintiff is permitted to rely upon them as well. Under these circumstances, the Court finds that the plaintiff has established an issue of fact with respect to the 90/180 category through her deposition transcript and medical records. Therefore, the branch of defendant's motion seeking to dismiss plaintiff's claim under the 90/180 category of Insurance Law 5102(d) is denied.

Accordingly, for the reasons set forth above, the motion by the defendant for an order granting summary judgment dismissing plaintiff's complaint is denied in part and granted in part.

Dated: May 15, 2019



ROBERT I. CALORAS, J.S.C.

FILED
 MAY 29 2019
 COUNTY CLERK
 QUEENS COUNTY